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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Millicom Services Company,)
)
Complainant,)
)
v.)
)
Southwestern Bell Telephone Company,)
)
Defendant.)

- File No. E-93-49
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MAR 24 1993

ENFORCEMENT DIVISION

ANSWER OF SOUTHWESTERN BELL TELEPHONE COMPANY

Southwestern Bell Telephone Company (SWBT), for its Answer to the Complaint filed herein, generally denies all allegations of fact contained in that complaint, except for those allegations hereafter specifically admitted. For further Answer, SWBT alleges, responding paragraph by paragraph:¹

1. SWBT does not have sufficient information either to admit or deny these allegations. Therefore, the allegations are denied.
2. Admitted.
3. SWBT does not have sufficient information either to admit or deny the allegations of the first sentence of this paragraph. Therefore, the allegations are denied. As to the second sentence of this paragraph, SWBT states that the complaint speaks for itself.
4. Denied.

¹The paragraphs of the Complaint are not numbered. For simplicity's sake, SWBT will respond as though the paragraphs were numbered, starting with the first paragraph on the first page as Number One and continuing thereafter. Attached hereto as Exhibit A is a copy of the Complaint with each paragraph numbered by hand to correspond to this Answer.

5. Neither admitted nor denied. The Complaint speaks for itself.

6. SWBT lacks sufficient information either to admit or deny the allegations of facts contained in this paragraph. Therefore, the allegations are denied.

7. To the extent this paragraph contains allegations of fact, they are denied. All conclusions of law are disputed.

8. See response to paragraph 7.

9. SWBT lacks sufficient information either to admit or deny the allegations of facts contained in this paragraph. Therefore, the allegations are denied.

10. Admitted.

11. Admitted.

12. To the extent that this paragraph contains allegations of fact, they are denied. All conclusions of law are disputed.

13. To the extent that this paragraph contains allegations of fact, they are denied. All conclusions of law are disputed.

14. SWBT admits that it is a competitor of Complainant. SWBT admits that no EUCL charge is attributed to any end user for SWBT pay telephones. All other allegations of fact in this paragraph are denied.

15. Admitted that Complainant ceased paying EUCL charges in November, 1990. All other allegations of fact contained in this paragraph are denied.

16. Allegations of fact are denied. Conclusions of law are disputed.

17. SWBT denies that Complainant is entitled to all relief requested herein.

AFFIRMATIVE DEFENSE

1. Statute of Limitations--Commission Rule 1.718 and 47 U.S.C. 415.

WHEREFORE, SWBT prays that Complainant take nothing by its complaint, and that SWBT be discharged with its costs.

~~MOTION TO DISMISS IN THE FOREGOING MATTER, DOCTY, DECEMBER 1991~~

SWBT hereby moves for dismissal of the Complaint for failure to state a cause of action. In support of the Motion to Dismiss, SWBT alleges and states:

1. The Complaint notes that Complainant ceased paying EUCL charges for its pay telephones in November, 1990. In that same month and year, as the Complaint also notes, Complainant filed an informal complaint against SWBT with the Commission. SWBT responded to the informal Complaint in July, 1991, which is duly noted in the Complaint. The instant formal Complaint was filed January 11, 1993. Section 1.718 of the Commission's Rules provides:

When an informal complaint has not been satisfied pursuant to § 1.717, the complainant may file a formal complaint with this Commission in the form specified in § 1.721. Such filing will be deemed to relate back to the filing date of the informal complaint: *Provided* [emphasis in original], That the formal complaint: (a) Is filed within 6 months from the date of the carrier's report, (b) makes reference to the date of the informal complaint, and (c) is based on the same cause of action as the informal complaint. If no

formal complaint is filed within the 6-month period, the complainant will be deemed to have abandoned the unsatisfied informal complaint.

The Complaint shows upon its face that it was filed more than sixth months after SWBT's report to the Commission in the informal complaint. Thus, by the terms of Section 1.718, the Complaint is "deemed to have been abandoned." Even if the Complaint is not deemed to have been abandoned, the filing of the formal Complaint herein, because it was not filed within six months of SWBT's response, does not relate back to the filing of the informal complaint. Since the Complaint seeks damages which allegedly occurred more than two years before the filling of the Complaint, the claim is barred by the Statute of Limitations at 47 U.S.C. 415.

2. To the extent, if any, that the Complaint is not barred by Commission Rule 1.718 and 47 U.S.C. 415, the Complaint rests on the assertion that only "end users" pay End User Common Line (EUCL) charges under Commission rules, and that Complainant is not an "end user" as the term is defined in 47 C.F.R. §69.2(m).

"End User" means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller.

3. Complainant alleges that (1) it is a carrier, (2) it does not use telecommunications for administrative purposes, and

(3) "none of the resale transmissions offered by the complainant originates on the complainant's premises."² Thus, since complainant is not an "end user," complainant should pay no EUCL charges.

4. Complainant, however, is not a "carrier." The Communications Act requires a carrier to obtain a certificate of convenience and necessity³ and to file tariffs covering its services.⁴ Complainant has not obtained a certificate of convenience and necessity from this Commission or any other regulatory body, nor has Complainant filed tariffs.

5. The D.C. Circuit has concluded that "[w]hat appears to be essential to the quasi-public character implicit in the common carrier concept is that the carrier undertakes to carry for all people indifferently." The court has contrasted those who make their service available to all and those who "make individualized decisions, in particular cases, whether and on what terms to deal."⁵

6. Complainant does not offer its services to all. Rather, Complainant places its pay telephones only in those locations where Complainant believes it can make money. Moreover, Complainant is under no obligation to place payphones anywhere at all, and certainly is under no obligation to place payphones in public

²Complaint, para. 12, p. 5.

³47 U.S.C. §214(a).

⁴47 U.S.C. §203(a).

⁵*National Association of Regulatory Utility Commissioners v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976).

areas. The test of a carrier is "whether there is any legal compulsion to hold itself out indiscriminately to the public."⁶

7. One requisite of a communications "carrier" is that it transmit messages of others over lines it operates or maintains.⁷ Complainant does not meet this requirement. The Communications Act distinguishes between "transmission" of signals over lines, on the one hand, and "facilities" dedicated to such transmission on the other.⁸ A coin telephone is a facility, not a transmission line, no matter that wires are contained in its plastic shell.

8. Even if Complainant is a "carrier," and SWBT specifically denies this, Complainant falls within the reseller exception of Part 69's definition of "end user." Section 69.2(m) provides in pertinent part that a reseller shall be deemed an end user if all resale transmissions originate on the premises of such reseller. Complainant's payphones are placed at locations under license or lease and as such, for purposes of Part 69, those locations constitute "the premises of such reseller." Through terms of agency or lease, private payphone providers such as Complainant are premises based resellers of telecommunications services within the definition of Section 69.2(m).

⁶*Cox Cable Communications, Inc.*, 102 F.C.C. 2d 110, 121, ¶ 26 (1985), citing *Transponder Sales*, 90 F.C.C. 2d 1238, 1255-57 (1982), *aff'd sub nom. World Communications, Inc. v. FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

⁷47 U.S.C. §§153 (a), (b), (d) and (h).

⁸ See 47 U.S.C. § 153(a) & (b).

9. Complainant is an "end user" under Section 69.2(m) and thus must pay EUCL charges. Therefore, complainant has failed to state a claim for which relief can be granted.

WHEREFORE, because Complainant has failed to state a claim for which relief may be granted, SWBT prays that the Complaint be dismissed and that SWBT be discharged with its costs.


ALTERNATIVE MOTION TO STAY PROCEEDING

In the alternative, SWBT prays that this Complaint be stayed until the Commission has entered its ruling on the Petition for Declaratory Ruling filed with the Commission by the American Public Communications Council on April 21, 1989 (DA 89-517), which petition is still pending. As the Complaint points out, DA 89-517 involves the identical questions of law raised in this Complaint.

Respectfully submitted,

SOUTHWESTERN BELL TELEPHONE COMPANY

By


James E. Taylor
Richard C. Hartgrove
John Paul Walters, Jr.

Attorneys for
Southwestern Bell Telephone Company

One Bell Center, Room 3520
St. Louis, Missouri 63101
(314) 235-2507

March 22, 1993

Exhibit A

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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Millicom Services Company

Complainant,

v.

Southwestern Bell Telephone
Company

Defendant.

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FEB - 1 1993

COMPLAINT

ENFORCEMENT DIVISION

File No. E-93-49

To: The Commission

The complainant alleges the following as its complaint
against the defendant.

THE PARTIES

- ① The complainant¹ is a New York partnership with its principal place of business at 555 63rd Street, Brooklyn, New York 11220 (telephone number 718-439-9292). The complainant is involved in the sale, lease, installation and maintenance of IPPs. Complainant's IPPs are connected to telephone lines furnished by defendant.
- ② The defendant has offices at One Bell Center, St. Louis, Missouri 63101. Defendant is a local exchange carrier ("LEC") providing access lines to complainant's IPPs.

¹ Millicom Services Company ~~acquired~~ is the successor in interest to Millicom Telecommunications Services, Inc. (or MTS, Inc.), who provided independent public payphones ("IPPs") in defendant's territory, and under whose name some records may be maintained.

INTRODUCTION

③ The complainant, Millicom Services Company, is a provider of IPP service. This complaint asks the Commission to rule that the Commission's rules and regulations do not authorize the defendant to impose end user common line ("EUCL") access charges upon the IPPs provided by the complainant.

④ An IPP provider is not included in the definition of end-user in 47 C.F.R. § 69.2(m), and is therefore not subject to the EUCL access charge imposed under Part 69 of the Commission's rules. The Commission's access orders make it clear that the non-traffic sensitive costs attributable to public pay phone service are assignable to the carrier common line charge and that the rationale that resulted in that assignment applies as persuasively to an IPP as to a local exchange carrier public payphone ("LECPP").

⑤ The complainant also seeks to recover as damages the EUCL charges it has paid in the past, and charges which continue to accrue.

⑥ Complainant notes that a petition for declaratory ruling was filed with the Commission by the American Public Communications Council ("APCC") on April 21, 1989 (DA 89-517), and that petition remains pending before the Commission. A copy of the APCC petition is attached as Exhibit 1, and is incorporated herein by reference. In addition, complainant understands that other formal complaints raising the same issue as that discussed herein

are also pending before the Commission. See C.F. Communications Corp. v. Century Telephone of Wisconsin et al., File Nos. E-89-170 through E-89-182.

THE LAW

⑦ The defendant is required by 47 U.S.C. § 201 to furnish communications service upon reasonable request and subject to the orders, rules, and regulations of the Commission. Under 47 U.S.C. § 201(b), "[a]ll charges, practices, classifications, and regulations for and in connection with such communications service, shall be just and reasonable, and any such charge, practice, classification or regulation that is unjust or unreasonable is hereby declared to be unlawful."

⑧ Under 47 U.S.C. § 202, it is unlawful for the defendant "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

THE CONTROVERSY

⑨ The complainant provides (or has provided) IPP service to its customers at approximately 200 IPP stations in the State of Texas, each of which is connected to a telephone line provided by

the defendant. For each such line, the defendant furnishes to the complainant, and the complainant pays, a monthly bill submitted by the defendant.

(10) Since complainant has been using telephone lines furnished by the defendant, the defendant has been charging the complainant a monthly EUCL access charge for each such line. That EUCL charge is imposed in a flat dollar amount normally described as a "subscriber line charge" on the telephone bills submitted by defendant to the complainant.

(11) In November, 1990, complainant filed an informal complaint against defendant with the Commission. In the informal complaint, complainant protested the assessment of EUCL charges on IPP lines, requested a determination that the defendant's practice is unlawful, and requested a refund of past EUCL charges improperly assessed. Defendant responded in July, 1991.

(Complainant does not have a copy of the attachment referenced in the response, but will attempt to locate it and forward it to the Commission.) On November 12, 1992, the Common Carrier Bureau Enforcement Division issued a letter to complainant, noting that it declined to take action on the informal complaint, and directing complainant that a formal complaint should be filed within sixty days of the date of the letter. A copy of the defendant's response, and the Common Carrier Bureau's letter is attached as Exhibit 2.

COMPLAINANT IS NOT AN END USER UNDER THE REGULATIONS

(12) The purported regulatory basis for the EUCL charge is 47 § C.F.R. 69.1(b), which provides that "[c]harges for . . . access services shall be computed, assessed and collected . . . as provided in this part," and 47 C.F.R. § 69.5(a), which provides that "[e]nd user charges shall be computed and assessed upon end users as defined in this subpart . . ." The imposition of the EUCL charge upon the complainant by the defendant is in violation of those sections because the complainant is not an end user as that term is defined in 47 C.F.R. § 69.2(m):

(m) "End User" means any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller;

Complainant is expressly excluded from this definition because complainant is a carrier that does not use the telecommunications service for administrative purposes and because the complainant is not an entity which offers telecommunications services exclusively as a reseller and none of the resale transmissions offered by the complainant originates on the complainant's premises. The defendant's EUCL charges are therefore contrary to the rules and regulations of the Commission and are therefore a violation of 47 § U.S.C. 201. See Exhibit 1.

COMPLAINANT IS EXEMPT FROM EUCL UNDER
THE COMMISSION'S ACCESS ORDERS

(13) The Commission, by formal order, has specifically exempted pay telephones from the EUCL charge, with certain exceptions not applicable to the complainant's telephones. MTS and WATS Market Structure, 93 F.C.C. 2d 241 (1983), recon. 97 F.C.C. 2d 682, 703-705 (1983) ("First Reconsideration Order"), further recon. 97 F.C.C. 2d 834 (1984), aff'd in principal part and remanded in part, NARUC v. FCC, 737 F.2d 1095 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 1224 (1985). For the reasons explained in APCC's petition for a declaratory ruling (see Exhibit 1, pages 6-12), the defendant's EUCL charges are in direct violation of an order of the Commission and are, therefore, a violation of 47 U.S.C. § 201.

THE DEFENDANT'S COLLECTION OF EUCL IS DISCRIMINATORY

(14) Defendant is a direct competitor of the complainant in the furnishing of payphone service. No EUCL charge or equivalent charge for recovery of non-traffic sensitive ("NTS") costs is attributed to any end user for the defendant's pay telephones (LECPPs). Instead, defendant recovers the cost of the LECPP line through the carrier common line charge ("CCLC"), imposed on interexchange carriers. For the reasons in APCC's petition for a declaratory ruling (see Exhibit 1 at pages 9-12), IPPs and LECPPs should be treated equally for purposes of recovery of NTS costs, and the NTS loop costs associated with IPPs should be recovered through the CCLC rather than from complainant. The imposition of

an EUCL charge by defendant upon the complainant's IPPs is an act of unjust and unreasonable discrimination against the complainant to its prejudice and disadvantage and an undue and unreasonable preference and advantage in favor of the defendant in violation of 47 U.S.C. § 202.

DAMAGES

(15) The complainant has been and will be damaged by the defendant in the amounts of the unlawfully imposed EUCL charges. The complainant has been wrongfully assessed EUCL charges of approximately \$49,440 by the defendant, and these charges continue to be assessed every month.² Complainant ceased paying EUCL charges billed to its IPPs in November, 1990.

COMPLAINANT'S STANDING

(16) The complainant is bringing this complaint against the defendant under 47 U.S.C. §§ 206 - 208 for its violations of 47 U.S.C. §§ 201 and 202, and its violations of the regulations and orders of the Commission.

(17) WHEREFORE, the complainant asks the Commission for the following relief:

1. Declaration. A declaration that the imposition by the defendant of a subscriber line charge or EUCL access charge upon the complainant's IPPs violates 47 U.S.C. §§ 201 and 202, and 47 C.F.R. §§ 69.1(b) and 69.5(a), and the orders of the Commission;

² The final amount of EUCL charges unlawfully billed to complainant will have to be determined in a final accounting following resolution of this complaint.

2. Damages. An award of the damages incurred by the complainant, including the EUCL charges wrongfully collected by the defendant, in an amount to be determined in a final accounting;

3. Costs and fees. An award of the complainant's costs and fees;

4. Other relief. Such other relief as the Commission may deem appropriate.

Respectfully submitted,

Millicom Services Company *[Signature]*

Millicom Services Company
555 63rd Street
Brooklyn, New York 11220

Dated: January 11, 1993

CERTIFICATE OF SERVICE

I, Liz Jensen, hereby certify that the foregoing Answer of Southwestern Bell Telephone Company in File No. E-93-49, has been served this 22nd day of March, 1993 to the Parties of Record.

Liz Jensen

Liz Jensen

March 22, 1993

Millicom Services Company
555 63rd Street
Brooklyn, NY 11220

ITS, Inc.
1919 M Street, N.W.
Room 246
Washington, D.C. 20036

Helen M. Hall
Keck, Mahin & Cate
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1201 New York Avenue, N.W.
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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

Millicom Services Company,

Complainant,

v.

Southwestern Bell Telephone
Company,

Defendant.

File No. E-93-49

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ENFORCEMENT DIVISION


REPLY

Complainant Millicom Services Company ("Complainant"), pursuant to Section 1.726 of the Commission's Rules and Regulations, 47 C.F.R. § 1.726, hereby files its reply to the affirmative defense asserted by Defendant Southwestern Bell Telephone Company ("Defendant") in its answer to the complaint in this matter, and in support thereof states as follows:

1. As its sole affirmative defense, Defendant alleges that Defendant's claim is barred, in whole or part, by the statute of limitations contained in "Commission Rule 1.718 and 47 U.S.C. 415." Because Defendant's limitations argument is one basis for Defendant's accompanying Motion to Dismiss or in the Alternative to Stay Proceedings ("Motion"), Complainant hereby incorporates by reference its Opposition to Defendant's Motion for purposes of this Reply. Complainant's Opposition is filed contemporaneously herewith.

WHEREFORE, for the reasons set forth in its Opposition to Defendant's Motion to Dismiss or in the Alternative to Stay Proceedings, Complainant Millicom Services Company respectfully requests that Defendant's affirmative defense be denied.

Respectfully submitted,


Albert H. Kramer
Douglas E. Rosenfeld
Keck, Mahin & Cate
1201 New York Avenue, N.W.
Washington, D.C. 20005-3919
(202) 789-3400

Dated: April 5, 1993

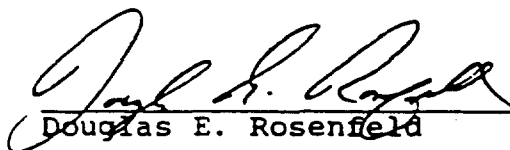
CERTIFICATE OF SERVICE

I HEREBY CERTIFY this 5th day of April 1993, that I have caused a copy of the foregoing pleading to be sent via first-class mail, postage prepaid, to the following:

James E. Taylor
Richard C. Hartgrove
John Paul Walters, Jr.
One Bell Center, Room 3520
St. Louis, Missouri 63101

* Thomas D. Wyatt
Chief, Formal Complaints and Investigations Br.
Common Carrier Bureau
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Douglas E. Rosenfield

* Hand-Delivered